

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JIMMIE HARDAWAY, JR.,
LARRY A. BOYD,
FIREARMS POLICY COALITION,
INC.,
SECOND AMENDMENT FOUNDATION,*

Plaintiffs,*

v.*

Docket Number:
1-22-cv-00771-JLS

Buffalo, New York
October 20, 2022

1:31 p.m.

STEVEN A. NIGRELLI,
In his official capacity as
Superintendent of the New
York State Police,
BRIAN D. SEAMAN,
In his official capacity as
District Attorney for the
County of Niagara, New York,
JOHN J. FLYNN,
In his official capacity as
District Attorney for the
County of Erie, New York.*

Defendants.*

* * * * *

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN L. SINATRA, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

PHILLIPS LYTLE LLP,
By NICHOLAS J. ROTSKO, ESQ.,
SAMUEL M. WILLIAMS, ESQ.,
One Canalside,
125 Main Street,
Buffalo, New York 14203-2887

1 For the Defendant Nigrelli: NEW YORK STATE ATTORNEY
2 GENERAL'S OFFICE,
3 By RYAN LANE BELKA, ESQ.,
4 Main Place Tower,
Suite 300A,
350 Main Street,
Buffalo, New York 14202.

5 For the Defendant Seaman: GIBSON McASKILL & CROSBY, LLP.,
6 By BRIAN P. CROSBY, ESQ.,
7 MELISSA M. MORTON, ESQ.,
69 Delaware Avenue
Suite 900,
Buffalo, New York 14202.

8 For the Defendant Flynn: COUNTY OF ERIE,
9 DEPARTMENT OF LAW,
10 By KENNETH R. KIRBY, ESQ.,
95 Franklin Street,
Suite 1634,
11 Buffalo, New York 14202.

12 The Courtroom Deputy: KIRSTIE L. HENRY

13

14 Court Reporter: BONNIE S. WEBER,
15 Notary Public,
Robert H. Jackson Courthouse,
2 Niagara Square,
16 Buffalo, New York 14202,
Bonnie_Weber@nywd.uscourts.gov.

17

18 Proceedings recorded by mechanical stenography,
19 transcript produced by computer.

20

21 (Proceedings commenced at 1:31 p.m.)

22

23 **THE CLERK:** All rise.

24 The United States District Court for the Western
25 District of New York is now in session. The Honorable John

1 Sinatra presiding.

2 **THE COURT:** Please be seated.

3 **THE CLERK:** The Court advises parties and listeners
4 that they are strictly prohibited from recording these
5 proceedings in whole or in part by any device.

6 Court calls a Hardaway and others versus Bruen and
7 others. Case number 22-CV-771. This is the date set for oral
8 argument.

9 Counsel for the plaintiffs, please state your
10 appearances for the record.

11 **MR. ROTSKO:** Nicholas J. Rotsko and Samuel M.
12 Williams of Phillips Lytle for plaintiffs Hardaway and others.

13 **THE CLERK:** Counsel for the defendants, please state
14 your appearances for the record.

15 **MR. BELKA:** Brian Belka, Office of the Attorney
16 General on behalf of Kevin P. Bruen.

17 **MR. KIRBY:** Kenneth R. Kirby, Assistant Erie County
18 Attorney for defendant John J. Flynn, in his official capacity
19 as district attorney for the County of Erie, New York.

20 **MR. CROSBY:** Brian Crosby from Gibson, McAskill and
21 Crosby, on behalf of Brian Seaman, the -- in his official
22 capacity as the Niagara County District Attorney.

23 **MS. MORTON:** Good afternoon, Your Honor. Melissa
24 Morton, also from Gibson, McAskill and Crosby on behalf of Brian
25 D. Seaman in his official capacity as District Attorney for

1 Niagara County.

2 **THE COURT:** Okay. Good afternoon, everyone. We're
3 here today on plaintiff's TRO application.

4 Do we have any preliminary issues that we should deal
5 with right away?

6 **MR. BELKA:** No.

7 **THE COURT:** No? I have one. Does anyone have an
8 objection with me amending the caption to put Nigrelli on the
9 caption as the defendant now, instead of Bruen, given the
10 transition?

11 **MR. BELKA:** No objection for the defendants, Your
12 Honor.

13 **MR. KIRBY:** No objection.

14 **THE COURT:** Anyone else?

15 **MR. ROTSKO:** No objection.

16 **THE COURT:** Okay. We'll do that.

17 I've spent a good deal of time studying the papers and
18 the relevant case law and I've had the benefit of the State's
19 filing in Goldstein from last Friday in the Southern District,
20 so I've had the ability to preview some of the arguments that
21 the State eventually made in this case.

22 So I'm kind of familiar and comfortable with the
23 issues and don't need to hear anyone summarize anything that
24 they have put in their papers, but I do want to have some of my
25 questions discussed here today, so that's going to be how we

1 proceed.

2 If we leave something out and you need to interject,
3 feel free. And for the district attorney defendants, I'm not --
4 given those submissions, and what they said, I'm not really
5 going to be looking to you all that much, but if you need to
6 chime in, feel free, okay?

7 All right. Let's talk about the standing issue first.

8 Mr. Belka, why don't the plaintiffs have standing?

9 **MR. BELKA:** Your Honor, the plaintiffs don't have
10 standing -- in part, the organizational plaintiffs do not have
11 standing because any action that they've taken as a result of
12 the CCIA is just an extension of the kinds of activities that
13 they do in the regular course of their business.

14 Both of the organizational defendants operate hotlines
15 and other member services to educate people about firearms,
16 policy and law.

17 The passage of the CCIA is no different. Whether it
18 was Constitutional or un-Constitutional, does not result in an
19 injury, in fact, to those organizational defendants (sic).

20 Additionally, the individual plaintiffs have
21 volunteered that they will comply with the law. They indicate
22 no -- they indicate no desire to violate the CCIA, therefore
23 there is no potentiality of enforcement of the CCIA, as it
24 relates to them individually.

25 I would also note that their desire to bring a

1 concealed weapon into a church is allowable in certain
2 circumstances under the CCIA.

3 As outlined in our papers, certain peace officers and
4 other security guards can provide the security that they
5 require.

6 Again, it's an argument that they have no injury in
7 fact, Your Honor.

8 **THE COURT:** Okay.

9 Mr. Rotsko, how do you respond to that?

10 **MR. ROTSKO:** First of all, with respect to the
11 institutional plaintiffs, this is the only state where the
12 plaintiffs have needed to set up a hotline and to divert
13 resources to responding to a plethora of questions from New York
14 State citizens and others passing through the State, given the
15 sweeping scope and the breadth of the CCIA, it was necessary to
16 set up a hotline.

17 So they are diverting resources away from their other
18 core activities to -- to respond to the CCIA. And under Second
19 Circuit precedent, that is sufficient to establish
20 organizational standing for these entities.

21 However, for the TRO, it -- the -- it's not really
22 even necessary for the two institutional entities to have
23 standing, because the pastors clearly do.

24 The pastors have been disarmed in their houses of
25 worship. They have been stripped of their ability to defend

1 themselves and their congregations and they suffer diminished
2 safety because of the ban on carrying firearms in places of
3 worship.

4 The State Police has made it clear that the CCIA is
5 going to be enforced. There is no waffling on the part of the
6 State Police.

7 And many cases cited in our brief reject the State's
8 proposed break the law standard. Our clients don't need to go
9 out and break the law in order to have standing.

10 They have been disarmed in their places of worship.
11 Their places of worship are in violent locations. Churches
12 suffer from threats of violence.

13 So that that injury is sufficient to establish
14 standing for the pastors and that's what we need in terms of a
15 standing for the TRO, Your Honor.

16 **THE COURT:** As to the two pastors, Mr. Belka, aren't
17 the -- isn't the fact that the statute is new, nobody is talking
18 about repealing it.

19 And the fact that the Governor and the head of the
20 State Police is on record, saying: We're going to arrest you if
21 you violate the statute, isn't that enough?

22 **MR. BELKA:** It's not enough, Your Honor. The
23 plaintiffs have indicated that they would comply with the
24 statute.

25 There is no indication of future enforcement, as it

1 relates to these plaintiffs individually. In fact, the
2 submissions by the District Attorneys indicate as much.

3 There has been absolutely no potentiality of
4 enforcement. Both the DAs said that they have not received
5 information related to enforcing the statute related to this
6 plaintiff or anyone else.

7 **THE COURT:** They don't have to go out and get arrested
8 to have standing, though, do they?

9 **MR. BELKA:** They do not. But they do need to indicate
10 that they would violate the statute being un-Constitutional and
11 they expressly do not do that.

12 **THE COURT:** All right. Let's move on from standing.

13 Does the Second Amendment right -- does the Second
14 Amendment right presumptively cover the two individual
15 plaintiffs? The pastors here?

16 Mr. Rotsko first.

17 **MR. ROTSKO:** Yes, Your Honor. It clearly does. The
18 Second Amendment protects the right of the people to keep and
19 bear arms in public, outside the home.

20 The pastors are part of the people. The firearms they
21 carried -- they carried to church prior to the ban are arms and
22 the churches are outside the home, so it definitely fits within
23 the language of the Constitution.

24 **THE COURT:** The right as to carry outside the home in
25 public, does that encompass places of worship?

1 **MR. ROTSKO:** It does, Your Honor.

2 **THE COURT:** Mr. Belka, how do you respond to that?

3 **MR. BELKA:** Your Honor, I think you have hit on the
4 point that we made in our brief, which is that there needs to be
5 a showing by the plaintiff that the Second Amendment text
6 extends to places of worship.

7 As Bruen noted or as we argued, Bruen does not
8 separate the world into home and other places. It expressly
9 limits public carry in sensitive locations.

10 And when sensitive locations are at issue, plaintiffs
11 are required to make a showing, based on text, history and
12 tradition, that there has been an ability to carry in sensitive
13 locations; in this case, a place of worship.

14 So as it relates to your question, does the Second
15 Amendment apply to the individuals? Yes.

16 Does it apply to their ability to carry at their place
17 of worship? Plaintiffs have not made that showing.

18 **THE COURT:** Anything -- anything else on that initial
19 showing concept, Mr. Rotsko?

20 **MR. ROTSKO:** Sure. The historical record is replete
21 with an absence of regulation barring carrying of firearms in
22 churches.

23 We submit a statute showing that firearms were
24 required to be brought to churches, up through the time of the
25 founding.

1 It's clear that prior to the CCIA, citizens could
2 carry firearms in church. And what the State is attempting to
3 do is shift the burden over on to plaintiffs, whereas -- you
4 know, that's unnecessary because the plain text of the Amendment
5 encompasses carry in church.

6 And it's the State's burden to demonstrate the
7 historical tradition.

8 **THE COURT:** Isn't that enough, Mr. Belka, that the
9 case law interpreting the Second Amendment has said that there
10 is a right in your home. There is also a right in public.

11 Haven't we covered everywhere at that point?

12 **MR. BELKA:** We haven't, Your Honor. Then if that's
13 the case, then Bruen would not have made -- they codified the
14 sensitive locations.

15 **THE COURT:** Well, that's a separate question. We're
16 talking about the threshold question now.

17 **MR. BELKA:** Correct, Your Honor. But I believe that
18 that is part of the threshold question.

19 Plaintiffs advance an essentially strict liability
20 standard, that as long as they come in and claim some type of
21 Constitutional violation, it requires the Government to go on a
22 historical scavenger hunt.

23 I don't believe that that is anything that is
24 contemplated in Bruen. I believe that there is an initial
25 showing required by the plaintiffs --

1 **THE COURT:** Okay.

2 **MR. BELKA:** -- to demonstrate that the Second
3 Amendment extends to these sensitive locations.

4 **THE COURT:** All right. Whether it is presumptively
5 covering the plaintiffs, there is a page and a half or two and a
6 half pages from Bruen on that topic, so I don't think I need
7 anything more.

8 Let's talk about the next step. Is the State meeting
9 its burden, assuming the State needs to meet its burden?

10 And the first part of it is talking about analogies to
11 courthouses, legislative assemblies and polling places.

12 In the State's brief, Mr. Belka, you wrote something
13 along the lines of that insofar as restricting firearms in
14 places like legislative assemblies or polling places aims to
15 minimize the chance of violence between those with opposing
16 views, the place of worship provision additionally serves an
17 analogous function.

18 What do you mean by that?

19 **MR. BELKA:** What I mean by that, Your Honor, is that
20 sensitive locations often are areas in which Constitutional
21 rights are enacted.

22 We're here right now, in a place that has generally
23 been considered a sensitive location and you cannot bring a
24 firearm into it.

25 The Constitutional right to access the courts comes

1 into conflict with public carriage in some of these sensitive
2 locations.

3 And that is at its -- is absolutely true in places of
4 worship, where -- I should just back up very briefly, we're here
5 on a facial challenge where the plaintiffs must demonstrate that
6 the current regulation is un-Constitutional in every aspect.

7 So with respect to Mrs. Boyd and Mr. Hardaway, the
8 question for the Court is: In a situation where all the
9 parishioners in a place of worship do not want firearms, can
10 somebody legally go into that place of worship and carry their
11 firearm without the enforcement of the CCIA?

12 It is that kind of standard that we're looking at.

13 **THE COURT:** So one parishioner has the veto right over
14 everybody else in a congregation?

15 **MR. BELKA:** I'm saying that in sensitive locations,
16 Constitutional rights come into conflict and certain individuals
17 in their place of worship could feel that their exercise of
18 religion is being infringed on by somebody else's public
19 carriage right.

20 Those sensitive locations throughout history have
21 defaulted -- defaulted, as we demonstrate in our papers, have
22 often restricted firearms in those locations, so those
23 institutions can serve those public policy purposes.

24 **THE COURT:** New York hasn't had a restriction like
25 that on its books since the beginning.

1 So from the beginning of time, we've had to worry
2 about people carrying legally in the pew next to me, right?

3 **MR. BELKA:** From the beginning of time, the person
4 wasn't carrying legally in New York, because the Sullivan law
5 hasn't had an extraordinarily restrictive view on concealed
6 carry and --

7 **THE COURT:** Which is not Constitutional, right?

8 So we're relying on the un-Constitutional part of that
9 statute.

10 **MR. BELKA:** Well, I disagree with that. The
11 requirement that whether -- whether it was this requirement or
12 others that depressed the number of concealed carry permits in
13 New York.

14 The additional probable cause -- the additional cause
15 standard that was required was found un-Constitutional, but the
16 rest of the licensing statute, which is rigorous, was upheld.

17 **THE COURT:** The number of people who have permits to
18 carry concealed in the State, whether it's one person or eight
19 million people, doesn't affect whether the carry rights are
20 Constitutional or not, does it?

21 In other words, the Constitution doesn't change
22 because more people can now carry concealed, does it?

23 **MR. BELKA:** It does not, Your Honor. However, in
24 these sensitive locations where other Constitutional rights,
25 such as access to the courts, voting, religion, your right to

1 worship exactly how you please, those issues do come in conflict
2 in these sensitive locations.

3 And historically, it has been demonstrated that the
4 way governments have handled that, all the way going back to the
5 dates we're going to talk about, are to restrict firearms in
6 those sensitive locations.

7 **THE COURT:** So talk, Mr. Rotsko, about the sensitive
8 locations now: Legislative assemblies, courthouses, polling
9 places.

10 Heller talks about schools, too, but Bruen doesn't
11 seem to want to pick that up.

12 **MR. ROTSKO:** Correct.

13 **THE COURT:** What's going on there and why is there a
14 failure of analogy?

15 **MR. ROTSKO:** Well, first of all, yes, churches are not
16 sensitive locations -- sensitive places.

17 I'll get to the analogies in just a moment -- the
18 specific analogies, but first I would just point out that before
19 we even need to start determining whether a church is like the
20 polling place, the legislative assembly or the court, we had to
21 check to see if the church is a new sensitive location.

22 The language in Bruen says: You get into that
23 historical analogizing if you are -- if the Court is confronted
24 with a new sensitive location that didn't exist at the time of
25 the founding.

1 Churches have been around for a long time. Churches
2 were here at the time of founding. Gun violence was present at
3 the time of the founding.

4 There is no evidence that the founders -- any state
5 legislature at the time tried to make churches a gun free zone
6 in order to deal with gun violence, so we don't even need to go
7 on to the analogies.

8 **THE COURT:** And perhaps -- and perhaps you can stop
9 there, but isn't it safer for us to keep talking?

10 **MR. ROTSKO:** Sure. Absolutely.

11 **THE COURT:** Okay. I understand the argument you are
12 making.

13 **MR. ROTSKO:** Okay.

14 **THE COURT:** I know where it comes from, but I do need
15 to know about whether there is a good analogy or not. I know
16 you are getting there.

17 Go ahead.

18 **MR. ROTSKO:** Yes, Your Honor. So churches are not
19 similar to legislative assemblies, polling places or courts.

20 In legislative assemblies and in courts, the
21 Government is providing the self defense. Basically, stepping
22 in and providing -- those are secure locations where the
23 Government is providing the security.

24 Churches do not have that -- that benefit. Polling
25 places are in operation once every two to four years, for a

1 limited duration; just during the course of election day.

2 Churches meet every Sunday. So the how and why
3 that -- that positions polling places, legislative assemblies and
4 courts as sensitive places at the time of the founding, the how
5 and why is it not present for churches.

6 Let me just see if I have another comment on that.
7 The other -- the other unique future of the polling places,
8 legislative assemblies and courts is -- well, particularly the
9 polling places and legislative assemblies, this is where you have
10 a lot of emotional discrepancy, perhaps, between citizens and/or
11 their representatives arguing passions and it makes sense to
12 keep firearms out of that circumstance.

13 Church is generally a place where people tend to get
14 along.

15 **THE COURT:** Mr. Belka, does it matter that polling
16 places, courthouses and legislative assemblies are places where
17 the core functions of our democracy are being exercised?

18 **MR. BELKA:** I think that that's part of it. I think
19 that that's part of it -- the Constitutional rights that are
20 being enacted there.

21 But I think that the Constitutional rights that are
22 being enacted are the core function of it. Not the access to
23 democracy functions.

24 **THE COURT:** So because people are exercising their
25 First Amendment rights at the place of worship, then you cannot

1 exercise their Second Amendment rights there at the same time?

2 **MR. BELKA:** I'm saying it could interfere.

3 **THE COURT:** Well, what --

4 **MR. BELKA:** I'm saying that that's one reason why we
5 don't allow a bunch of guns around a voting place, because
6 people can be intimidated because there is other things that
7 guns do other than cause violence.

8 If there was a gun in this room, it would raise the
9 temperature quite significantly.

10 **THE COURT:** What if we're -- what if there is a rally
11 on the steps of City Hall? That's a First Amendment protected
12 activity, isn't it?

13 If people are --

14 **MR. BELKA:** Assemblage, that's right.

15 **THE COURT:** So you can't have your Second Amendment
16 rights there at the same time?

17 **MR. BELKA:** I think that it can -- I think that in
18 certain circumstances, it can be limited by the Government.

19 **THE COURT:** Okay. Anything more on the sensitive
20 places issue, Counsel? No?

21 All right. Let's talk about the next piece of the
22 analysis, is whether there is an American tradition in support
23 of this place of worship exclusion.

24 Tell me about your argument, Mr. Belka, and the
25 enactments that are cited in your papers.

1 **MR. BELKA:** Your Honor, we cited to -- as you know, we
2 employed a historian to go through and have an expert comb the
3 historical record for us.

4 I think that it is required. I think that with due
5 respect to everyone in the room, including myself, that lawyers
6 and judges pontificating about history and exactly what everyone
7 was thinking in 1791 is a dangerous way to go about things.

8 And I think that expert historians are well suited for
9 that type of analysis. Our historian found six state statutes
10 that restricted carriage in places of worship; four municipal
11 statutes that restricted carriage in places of worship.

12 And that there were eight states that had general
13 prohibitions on carriage and therefore did not require a
14 specific place of worship carriage provision.

15 And six municipal statutes that, again, would not
16 require any sort of specific place of worship statute because
17 that would be encompassed by the general prohibition.

18 In addition, there is high court commentary
19 identifying at least seven states that had public carriage
20 restrictions in place of worship.

21 Those identified as *Andrews v. State*, *English v. State*
22 and *Hill v. State* and *State v. Reendo* (phonetic).

23 These -- the high court commentary was not that
24 carriage restrictions in places of worship were outliers, but,
25 in fact, scoffed at the idea that anyone would need to bring a

1 gun into a place of worship.

2 History is hard. Some of it is lost along the way and
3 the things we can find indicate that public carriage
4 restrictions in places of worship were not only common, but were
5 not uncommon.

6 And plaintiff has made no showing other than a couple
7 of statutes that predate the -- I believe that they predate the
8 Second Amendment -- no. I'm sorry. That's a totally separate
9 argument.

10 They have not made any showing of courts -- high court
11 commentary or other statutes saying that there should be guns in
12 churches.

13 Other than the few compulsory statutes that they cite
14 and our expert has made some commentary on what kinds of
15 statutes those were.

16 **THE COURT:** The Texas statute, the Missouri statute,
17 the Virginia statute, the Georgia statute and then there is two
18 territories, Oklahoma and Arizona at the time.

19 How long were each of those enactments on the books?

20 **MR. BELKA:** I have no idea, Your Honor.

21 **THE COURT:** Doesn't that matter? Doesn't it matter --

22 **MR. BELKA:** Perhaps.

23 **THE COURT:** -- if we are looking for a tradition,
24 doesn't it matter we aren't talking about enactments that may
25 have been a flash in the pan?

1 **MR. BELKA:** Your Honor, I think that when we get into
2 how long and how many -- I realize that I just recited those
3 things -- I think that we are into a, you know, how many scoops
4 to make a sundae kind of argument.

5 And I think what the Court needs to look at here is
6 whether or not what you are looking at looks like dessert, okay?

7 You have a whole bunch of statutes that have been
8 cited. It's a clear American tradition that exists; there is
9 proof in front of the Court on it.

10 There is no proof on the other side that that is not
11 the case. There is no expert on the other side saying that
12 these are not the way things were.

13 I find it hard to believe that the balance of the
14 evidence is on the other side in this case.

15 **THE COURT:** Mr. Rotsko, what about those laws?

16 **MR. ROTSKO:** Well, Your Honor, the Tennessee law was
17 on the books for less than a year; the Georgia law was on the
18 books for eight years.

19 The Georgia Supreme Court upheld that Georgia law and
20 the Supreme Court in Bruen said that the Georgia Supreme Court
21 was -- was applying a clearly erroneous understanding of the
22 Second Amendment when the Georgia Supreme Court upheld that law.

23 These -- these laws that are identified by the State's
24 esteemed professor are a mere experiment in state law, scattered
25 around the country.

1 They come nowhere near establishing a tradition at the
2 founding, that guns or churches were gun free zones.

3 They suffer a variety of infirmities, the Bruen court
4 has pointed out and rejected. And they just -- there is no way
5 that can constitute a tradition.

6 Six state laws that lasted just a short period of
7 time, a couple territories, handful of municipalities and those
8 municipalities, those ordinances banned guns everywhere in town.
9 That's clearly violative of the Second Amendment.

10 So they're using un-Constitutional laws to try to
11 justify another un-Constitutional law.

12 Bruen makes clear that if subsequent tradition departs
13 from the text -- what the text of the Second Amendment says,
14 then the text controls. That's what I have to say about the
15 professor's work.

16 With respect to the date of these statutes, none of
17 them are from anywhere near the founding.

18 The Supreme Court has made clear that the scope of the
19 Second Amendment is what it was in 1791. That's what Heller
20 says, as you know.

21 And McDonald came along and said that when that --
22 that right is incorporated against the states, it's the very
23 same scope that it has against the states that it has against
24 the Federal Government.

25 They need to find some evidence that churches were gun

1 free zones in 1791. Not only did they not find a single piece
2 of evidence to that effect, but they certainly didn't identify a
3 tradition.

4 **THE COURT:** But the Court spent a lot of time, a lot
5 of pages on history, during the Civil War -- before, during and
6 after the Civil War.

7 That has to be relevant in some way, doesn't it?

8 Why is the Court spending so much time on that
9 history, if it's not relevant?

10 **MR. ROTSKO:** The way -- the way Bruen discusses that
11 history, my understanding is that it is -- it helps to confirm
12 what -- what the scope of the Second Amendment was at the time
13 of the founding.

14 **THE COURT:** If the -- Mr. Belka, if the 14th Amendment
15 is going to be looked at post enactment, with laws that came on
16 the books maybe 20 years after the ratification of the 14th
17 Amendment -- if that's going to set up one outcome, how can that
18 outcome be different from an outcome that would be set up by
19 looking at 1791 era enactments and laws and understandings that
20 would then govern Congress?

21 Can you have a Second Amendment outcome be different,
22 applicable to Congress and then applicable to the states?
23 Different tests, different outcomes?

24 **MR. BELKA:** I believe that that's McDonald, Your
25 Honor. That there isn't. That it is applied the same to the

1 Federal Government.

2 **THE COURT:** I think that's right.

3 So how did to we look at reconstruction era statutes
4 then and have that maybe affect what happened in 1791?

5 **MR. BELKA:** Well, the Court expressly -- sorry, the
6 Court in Bruen expressly does not decide between 1791 and 1868.

7 **THE COURT:** But all of your statutes are
8 reconstruction era statutes, aren't they?

9 **MR. BELKA:** Yeah. Because finding historical statutes
10 is hard. Stuff gets lost along the way and the things -- I
11 think that it is instructive that anything you find points
12 towards the outcome that restrictions in churches are allowable.

13 **THE COURT:** Except for the colonial era laws that say
14 you must bring your sidearm to worship.

15 What about that?

16 **MR. BELKA:** I mean, when they have three -- I guess,
17 we're comparing numbers -- we're, like, three versus six.

18 I mean -- look, I think that the idea of -- the idea
19 that if you didn't cross the Mississippi in 1791, that you can
20 never cross it ever again, I do find a little bit goofy, okay?

21 But if part of the analysis is what the historical
22 tradition is, I think that being able to have an expert put
23 together a certain amount of western history and put it all
24 together, number one, it's the history that we found. Number
25 two, that means there could be other stuff out there.

1 But in the absence of other evidence indicating that
2 that was not the case, I think that it's relatively persuasive
3 in this context.

4 **THE COURT:** Okay.

5 Mr. Rotsko --

6 **MR. ROTSKO:** I would reiterate that churches are not
7 new. Gun violence is not new. They both existed at the
8 founding.

9 There is no evidence that any state legislature or
10 Congress tried to make churches gun free zones to deal with gun
11 violence during the founding era.

12 **THE COURT:** What we're looking at here, isn't it, is
13 whether the right that was enacted or codified in 1791
14 encompassed the right to carry in places of worship, aren't we?

15 Aren't we trying to figure out whether that's the
16 case? Isn't that the whole purpose of the analysis?

17 **MR. ROTSKO:** Yes, Your Honor.

18 **MR. BELKA:** I agree, Your Honor.

19 **THE COURT:** So shouldn't we be focused more on what
20 the understanding of the right was around 1791?

21 **MR. ROTSKO:** Yes, Your Honor.

22 **THE COURT:** Aren't we -- I'm not saying we need to
23 ignore entirely what happened in 1860 -- '70, '72, 1890, but
24 here is the thing, in 1905, the Sullivan law was enacted.

25 And it was on the books for 117 years and the Court

1 wasn't persuaded that that was long enough either.

2 **MR. BELKA:** I'm sorry, the Court wasn't --

3 **THE COURT:** The Court in Bruen was not persuaded that
4 117 years worth of New York Sullivan law was enough to establish
5 a tradition there.

6 **MR. BELKA:** Well, the Government is going to have a
7 pretty tough time, if 107 years of a tradition isn't enough.

8 **THE COURT:** Tell me about irreparable harm.

9 **MR. ROTSKO:** Your Honor, the pastors are suffering
10 irreparable harm because their places of worship are less safe
11 now than when the statute -- they are less safe now, because of
12 the statute.

13 There is diminished security of the pastors and their
14 congregations. The Tops shooter in Buffalo, in May, he
15 committed the atrocity on Saturday.

16 His plan was to go to a majority black church the next
17 day, according to the Washington Post research into his private
18 messages.

19 There was a mass shooting at an African American
20 church in Charleston. This raises the risk level that these
21 pastors perceive.

22 And it's not an illusion. It's a reality. They can't
23 protect themselves or their congregants because of this law.

24 The State doesn't even attempt to argue that the place
25 of worship ban will in any way mitigate the risk of violence in

1 the churches from mass shooters or otherwise.

2 The ban makes the churches essentially sitting ducks.
3 It takes a soft target and makes it even softer. The TRO will
4 at least give the churches a fighting chance to defend
5 themselves in the event that -- of a violent threat.

6 That happened in a church in Texas. It happened
7 recently in an Indiana mall. The churches face irreparable
8 injury.

9 **THE COURT:** Your clients can hire security, can't
10 they?

11 That's what Mr. Belka argues or -- I don't know --
12 deputize some of their congregants, maybe, something like that.

13 **MR. ROTSKO:** Well, I think under the CCIA, the church
14 could not simply pass a resolution designating two or three
15 congregants and/or the pastor as those with a duty to keep the
16 peace in church, because they wouldn't be -- they wouldn't meet
17 the exception to the statute, just by the virtue of being
18 designated by the church.

19 You know, to the security guard point, the Second
20 Amendment doesn't say that you have the right to keep and bear
21 arms if you -- if you can afford security guards or if you can't
22 afford security guards.

23 It doesn't require you to first go and exhaust your
24 ability to go find security guards. That's what we would say on
25 that.

1 **THE COURT:** Mr. Belka, irreparable harm. Tell me why
2 there isn't any here, sufficient for a TRO.

3 **MR. BELKA:** Your Honor, the issue is irreparable harm.
4 Again, it is -- there are exceptions under the statute by which
5 places of worship can implement armed security equivalent to
6 individuals who are exercising their right for private carriage.

7 In addition, I'll note that this exact issue was
8 before Judge Broderick in the Goldstein matter. He found that
9 the plaintiffs making similar accusations, although Jewish
10 houses of worship, versus historically black houses of worship,
11 that those claimed irreparable harms were far too speculative
12 and remote.

13 It is what we've argued in this case as well, that
14 there is no irreparable harm for those reasons.

15 **THE COURT:** So if I carried into a house of worship
16 every day and all of a sudden, I can't carry anymore and then
17 after that something happens and I can't pull out my sidearm,
18 isn't that irreparable harm?

19 **MR. BELKA:** Your Honor, I believe that irreparable
20 harm -- again, under this statute, you would be protected by
21 the -- by the ability to have armed security guards and have the
22 same kind of security that you would be able to provide for
23 yourself.

24 **THE COURT:** Okay. Let's talk about -- let's talk
25 about the public interest.

1 Why, Mr. Rotsko, is a temporary restraining order in
2 the public interest?

3 **MR. ROTSKO:** Your Honor, the State's alleged concern
4 is accidental shootings in church and violent arguments arising
5 between the congregants, those are unpersuasive.

6 Our plaintiffs have carried in church for years. None
7 of those instances have ever happened.

8 The -- it's emphatically within the public interest
9 that the Constitutional rights of our citizens are protected,
10 Your Honor.

11 **THE COURT:** In their papers, Mr. Belka, plaintiff made
12 an argument about gun violence specifically against churches
13 covered in the news recently bearing on the public interest
14 issue.

15 How does the State respond to that?

16 **MR. BELKA:** Your Honor, the Government's position on
17 public safety is that it would be advanced by enacting a place
18 of worship restriction.

19 Certainly, that's the policy choice that's been made
20 and there is significant evidence to back those kinds of policy
21 choices up.

22 Again, it's also within the public interest that these
23 institutions be allowed to function as Constitutional enacting
24 bodies, right?

25 That the individuals at the places of worship be able

1 to worship in peace, without the threat of gun violence.

2 I understand the argument on the other side, but, you
3 know, it's like lawyers, you get one lawyer and that
4 proliferates six more.

5 It is the same with guns. The policy choice in this
6 case is to try to limit firearms in that institution in order to
7 allow the free expression of religion to take place.

8 **THE COURT:** I know that's the policy choice that was
9 made by the legislature and the Governor.

10 And contrasted with what's in the Constitution and the
11 case law that says that when you are looking at the Second
12 Amendment, certain policy options fall off the table.

13 **MR. BELKA:** It also is true that the Second Amendment
14 does not act as a regulatory straightjacket.

15 And there are policy options that are available to
16 these individuals, specifically, in the sensitive locations as
17 allowed by Bruen and Heller.

18 **THE COURT:** So in the context of whether there may be
19 a Second Amendment violation, under the TRO rule, I need to
20 determine whether the injunction is in the public interest or
21 it's not in the public interest.

22 Does it matter? Does it matter the extent of the
23 Constitutional violation or whether it's a close question,
24 whether it's a clear violation?

25 **MR. BELKA:** I believe that it needs to be a clearer

1 violation, as opposed to a close question, Your Honor.

2 **THE COURT:** Mr. Rotsko, anything else on public
3 interest?

4 **MR. ROTSKO:** I think it is a clear violation, Your
5 Honor.

6 **THE COURT:** You think it's a clear violation here, is
7 what you are saying?

8 **MR. ROTSKO:** Of the Second Amendment.

9 **THE COURT:** Right.

10 **MR. ROTSKO:** I guess I could also point out that
11 the -- I'm a little unclear.

12 It seems to be that the State is arguing that a
13 congregant -- or that if this law is enjoined, that no church
14 could make a policy decision to ban firearms independently in
15 their congregation and that's not what I think the Second
16 Amendment here requires.

17 Churches certainly would have the right to be able to
18 make their own churches gun free zones, if they so chose. The
19 question is whether the State can do it and we're arguing that
20 they can't.

21 **THE COURT:** Okay. On public interest, Mr. Belka,
22 final word? Anything else?

23 **MR. BELKA:** Your Honor, I think that the balance of as
24 it relates to the public interest strongly cues in favor of
25 enacted public policy that allows these institutions to function

1 as designed and the public policy that has been enacted is to
2 have them be a gun free zone.

3 **THE COURT:** Is there anything -- the issue is having
4 the congregations be without any firearms is safer -- that's the
5 argument versus -- we're talking just about this Rule 65 prong
6 here -- versus letting the congregation carry, if that's what
7 they want to do and then that's safer.

8 Those are the competing arguments, I think. And when
9 the rule is you can't carry into this place of worship, is the
10 bad guy going to listen to that rule?

11 Is that funny? I mean, I think we're talking about
12 pretty serious things here.

13 **MR. BELKA:** We are talking about serious things, Your
14 Honor. I think that as a point of analysis, whether or not
15 individuals will follow the law is not a good way to decide
16 whether or not that law is valid.

17 **THE COURT:** So the bad guy who wants to shoot up these
18 black churches, he's not going to listen to the statute, is he?

19 Not even close.

20 **MR. BELKA:** I assume it's a rhetorical question.

21 **THE COURT:** That's right.

22 Mr. Kirby, is there anything that you or your client
23 wishes to add?

24 **MR. BELKA:** No, Your Honor.

25 **THE COURT:** How about Mr. Crosby?

1 **MR. CROSBY:** No, Your Honor. Just that District
2 Attorney Seaman is kind of between a rock and a hard place in
3 that he's sworn to uphold the law and the law on its face at
4 this point appears to have some Constitutional challenges to it.

5 And we believe that as a result of that, the
6 appropriate remedy is to issue a TRO and have a judicial
7 determination as to the Constitutionality of the law.

8 **THE COURT:** Mr. Rotsko, anything further from your
9 end?

10 **MR. ROTSKO:** Nothing further, Your Honor.

11 **THE COURT:** Mr. Belka --

12 **MR. BELKA:** For the record, Your Honor, if a TRO is
13 issued, defendant would request that it be limited to these two
14 individual plaintiffs.

15 **THE COURT:** Okay. So anything to that, Mr. Rotsko?

16 **MR. ROTSKO:** We would object. We think that the TRO
17 should be -- should enjoin enforcement of the statute against
18 all potential defendants who -- or against -- broadly, Your
19 Honor -- not just against our two plaintiffs. Let's put it that
20 way.

21 **THE COURT:** How would that work, Mr. Belka? That just
22 these two plaintiffs are allowed to carry in their place of
23 worship and that's it? Everybody else in the state can't?

24 **MR. BELKA:** It's generally done in order to preserve
25 the status quo, Your Honor.

1 **THE COURT:** All right. I don't need anything else
2 from you now. I'll reserve decision, but I'm fairly close on
3 this, as I indicated earlier.

4 I've had a good deal of time with your arguments --
5 the previous version of your arguments submitted in Goldstein
6 last Friday, as well as the same expert submission that was
7 submitted then, too, so I was able to spend some time with all
8 of it.

9 So a written decision will be coming shortly.
10 Anything else, Counsel?

11 **MR. ROTSKO:** No, Your Honor.

12 **MR. BELKA:** Nothing from the defendants, Your Honor.

13 **MR. KIRBY:** No, Your Honor.

14 **MR. CROSBY:** No, Your Honor.

15 **THE COURT:** Everybody have a good day thank you.

16 **MS. MORTON:** Thank you, Your Honor.

17 **MR. ROTSKO:** Thank you.

18

19 (Proceedings concluded at 2:15 p.m.)

20

* * *

21

22

23

24

25

1
2 In accordance with 28, U.S.C., 753(b), I certify that these
3 original notes are a true and correct record of proceedings in
4 the United States District Court for the Western District of
5 New York before the Honorable John L. Sinatra, Jr.

6
7
8
9
10 s/ Bonnie S. Weber
Signature

October 26, 2022
Date

11
12 **BONNIE S. WEBER**

13 Official Court Reporter
14 United States District Court
15 Western District of New York
16
17
18
19
20
21
22
23
24
25